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IN THE

Supreme Court of the United States

October Term, 1941.

No. 853.

In the Matter of HARRY M. ALBRIGHT, Bankrupt.

ROBERT P. SHICK, Petitioner,

v.

WILLIAM A. GOODMAN, Trustee of HARRY M. ALBRIGHT, Bankrupt, Respondent.

Petitioner's Reply Brief Sur Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

EDWIN C. EMHARDT,
Counsel for Petitioner.

International, 236 Chestnut St., Philadelphia

INDEX.

	Page
Petitioner's Reply Brief	1
A. Respondent's Statement of the Case	1
On March 14, 1927 Respondent's "Playing Fast and Loose" with the U. S. Bankruptcy Court's Process Begins	5
B. Respondent's Argument	8

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HARRY M. ALBRIGHT, BANKRUPT.

ROBERT P. SHICK,
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v.

WILLIAM A. GOODMAN, TRUSTEE OF HARRY M. ALBRIGHT, BANKRUPT,
Respondent.

PETITIONER'S REPLY BRIEF.

Basic and fundamental errors in Respondent's Brief in answer to the petition for a certiorari and its supporting brief, necessitate a brief reply to its—

A. Statement of the Case, and

B. Argument.

A. Its statement of the case sedulously ignores or evades stubborn facts in the case:—

1. The escrow agreement of October 18, 1923 was necessitated by the debtor Albright's desire to give a good title to one parcel of his lands in Montgomery County, Pennsylvania, that were subject to *three* judgment liens held by petitioner. The subject matter of this agreement was these 3 judgment liens.

2. The requirements of the title company, that was asked to insure the grantee's title to this parcel of land, required the representation by debtor, as grantor, that he was *not* involved in or contemplated bankruptcy proceedings for himself.

3. To facilitate the financial settlement for such sale of debtor's parcel of land, petitioner agreed to escrow with the title company insuring the title to grantee, the net proceeds of this sale, pending the determination, "amicably or by appropriate legal proceedings", of the debtor Albright's objections to the validity of the *three* judgment liens.

4. The sale realized a fund, which was by this agreement escrowed, subject to the terms of this agreement, made by Pennsylvania citizens and subject to that State's laws for its construction and performance.

5. Efforts to settle "amicably" the dispute as to the validity of the three judgments failing, petitioner adopted the only "appropriate legal proceedings" open to him,— the use of attachment executions surjudgments, and these were served on November 7, 1923.

6. The debtor Albright had refused to adopt the well established course in Pennsylvania to carry out his obligation under this contract, i. e., the use of petitions to open the judgments and be let into a defense thereto. This would have resolved quickly the dispute as to the validity of the 3 liens, as in equity, upon bill and answer and depositions, if any evidence were required.

7. This debtor, however, elected to use the U. S. Bankruptcy Court to "hinder, delay and defraud" petitioner's

just claims upon these judgments, filed his petition there and secured an adjudication in voluntary bankruptcy on November 9, 1923.

8. In his schedules he listed petitioner's 3 judgments as "secured claims (claimed to be invalid)" and the Referee listed them on his Docket as "secured claims".

9. At the first meeting of creditors, the feud between the debtor and Walter G. Roland, legal plaintiff in the two judgments still unpaid showed itself (App. p. 4a), and petitioner, to give proper notice to the other creditors of debtor, as well as to protect his claim for any deficiency on his claims, in the event that the fund (in lieu of the parcel sold on October 18, 1923) and other lands of debtor, (the security for his claims) did not realize enough to pay the three judgments, filed *formal proofs* only of his three "secured claims", nothing more. He did not ask to participate in the meetings of creditors, by having this security appraised and his right to vote thereby determined, or otherwise. He did not "press" his claim, as respondent's brief on p. 6 asserts. He was present at the meetings of creditors only when Walter G. Roland (his assignor of the 2nd and 3rd judgments) was under cross-examination, as a witness subpœnaed under Section 21 A of the Bankruptcy Act, to be examined as to the "acts, conduct and property" of the bankrupt. He *defended* only, his claims against improper or illegal attempts to impeach his security—the three judgment liens.

10. Early in the prolonged hearings before him, the referee found that the bankrupt's testimony as to charge of forgery of the $3,000. judgment was palpably false and directed the trustee to request the escrowee to pay this $3,000.

judgment out of the escrowed fund—on December 24, 1924. The personal feud persisted, however, throughout the prolonged hearings, even showing its influence upon the referee's conclusions of fact, for his orders of September 28, 1926 (R. 285, 1937 pp. 15-6, Cf. App. p. 34a, line 17).

11. When the hearings before the Referee ended in March 1926 without any action by him directing the trustee to recover the escrowed fund, in a plenary proceeding, petitioner pursued his remedy in the State court, on the attachments.

12. On July 28, 1926, the respondent as trustee for the bankrupt, properly filed his petitions to the State court for leave to intervene as defendant in the two unpaid judgments and to present his defenses thereto. His petitions alleged, *inter alia*, the pendency of federal bankruptcy proceedings that would control any action by the State court. This, petitioner denied in a responsive answer.

13. On October 8, 1926 these petitions of respondent came on for a hearing before the Argument Court of 3 judges in the State court, but when called upon by that court to support by depositions his allegation as to a controlling federal proceeding, respondent's then counsel deliberately suppressed the fact that the bankruptcy referee had on September 28, 1926, filed findings that the judgment notes had been given without consideration and orders, that the claims thereon be "disallowed and expunged".

14. As a result of this deceit by trustee's counsel, the State court was constrained to find, on January 28, 1927, that it was the *proper forum* in which to test the validity of the judgments and directed the respondent to file within fifteen days his proper petitions to open the judgments,

etc., at the same time entering *stay orders* against further proceedings on the judgments.

15. These findings and orders the respondent made final, definitive and appealable by his acceptance of them in his petitions of February 11, 1927 for an extension of time to March 14, 1927 within which to file his petitions to open, etc., and by his taking no appeal therefrom to the Supreme Court of Pennsylvania. These orders of the State court (of January 28, 1927) thus became *res judicata* as of that date, and under the rule of comity was for the purposes of these two judgments, controlling and determinative of all subsequent proceedings in the Bankruptcy Court.

ON MARCH 14, 1927 RESPONDENT'S "PLAYING FAST AND LOOSE" WITH THE U. S. BANKRUPTCY COURT'S PROCESS BEGINS.

16. On this date, the last day for his compliance with the State court's orders of January 28, 1927, the respondent resorted to the Bankruptcy (U. S. D. C. E. D. of Pa.) and on his ex parte applications obtained the restraining orders despite petitioner's earnest request to the District Court judge for leave to file answers to respondent's petitions, thereby to test respondent's right to such restraining orders against further proceedings in the State court, on the attachments in execution on the judgment liens.

17. Petitioner's efforts to have judicially reviewed by the Bankruptcy Court the Referee's orders resulted in the irregular and ununderstandable orders of January 31, 1928, (so pronounced by the D. C. judge on November 6, 1940. Vid. R. 35a; for orders Vid. 28a, 29a), because of the legal conclusions of the reviewing judge *contra:*—

"the orders" (referee's of September 28, 1926, expunging petitioner's "secured claims") "are certainly not to be read as interference in any way with the record of the State court", in his opinion of November 10, 1927; "he" (petitioner) "may still assert his liens against the real estate and the funds in the hands of the garnishee and is *not concluded* by the findings of the referee", in his opinion of November 23, 1927, (vid. R. p. 15a [13]).

18. On appeal to the U. S. C. C. A. 3d C., that court concluded:—"We find no error in the court below (U. S. D. C.) enjoining him in so doing. Its decree is therefore affirmed." This obviously referred only to the restraining orders of March 14, 1927—not to the final orders of January 31, 1928, sustaining the referee's orders of September 28, 1926. Such final order but added another layer to the veritable tumulus of error then forming and now presented to this Court for an archaeological operation to discover the true factual situation at its base.

19. But the respondent successfully imposed upon the State court this order of the U. S. C. C. A. 3d. C. and this court's denial of a certiorari to review it upon the then record, to treat them as final, definitive orders, making the illegal and void orders of the referee (of September 28, 1926) *res judicata* of the invalidity of the judgment liens in the State court, *and*, despite its (State Court's) final orders of January 28, 1927, making the questions of the proper forum and its (Pennsylvania) procedure, *res judicata*, as of that date (to be in the State jurisdiction) to piecemealwise (a) on July 18, 1930, dissolve the attachments in execution; (b) on July 15, 1932, to vacate the stay orders of January 28, 1927; and finally (c) on January 17, 1936, to reverse the judgment liens and enter judgments

in favor of the respondent on the record of these judgments, entered on Septmber 14, 1923.

All these orders, undoing the State Court's own record upon these judgments, from their entry in 1923 up to January 28, 1927, were made upon the faith and credit of (but so wrongly given to) the apparent affirmance by the Bankruptcy Court, of the referee's orders of September 28, 1926 and their effect upon these judgments, self-confessed upon "judgment" notes under the bankrupt's seal and liens upon his real estate in Montgomery County, Pennsylvania. (For a graphic view of the basic errors in this cause, see pp. 10-11, of petitioner's brief (as appellant) in the U. S. C. C. A. 3rd C.).

20. Most amazingly, on September 9, 1930 (shortly after he had secured on July 18, 1930 dissolution of the attachments in the State court), respondent filed there his sworn answers, solemnly admitting that the service of these attachments on November 7, 1923, had drawn the escrowed fund into the possession of that State court, and had given it, as of that date, full and complete jurisdiction over the *res* (fund and judgments) and the parties, petitioner and Albright, later the bankrupt, (on November 9, 1923). Duplicitous is but a mild word, properly to characterize this action on the part of trustee and his then counsel.

21. In March 1940, respondent petitioned the State Court for an award to him of the fund in escrow, but was refused such an award for the reasons, (a) the dissolution of the attachments, on July 18, 1930, had removed the fund from its (State Court's) possession, and (b) his petition did not join the petitioner as a co-defendant with the escrowee.

Thus, by respondent's own acts the fund in escrow is now a *waif*, owner unknown, and liable possibly to an escheat. And the *purpose* of the contract of October 18, 1923, between petitioner and Albright and the title insurance company (escrowee), *completely frustrated*, all by respondent's most irregular (to characterize them mildly) acts, to the great loss of petitioner, by the confiscation of his security (of upwards of $30,000.) for his "secured" claims, *without due process of law.*

The above facts—(in paragraphs 16-20 *supra*) speak for themselves and call for a proper judicial characterization of such, the respondent's use of the process of the Bankruptcy Court to "hinder, delay and defraud" petitioner of his just claims against H. M. Albright, debtor-bankrupt here involved.

B. Respondent's Argument.

Petitioner accepts the law respondent has invoked and the authorities citied in his brief—as to the doctrine of *res judicata*, but urges that in his application of them, to the peculiar and unusual facts of this case, (involving, as it does, a conflict of jurisdiction with its basic rule of comity), he has not shown that "utmost good faith and fullest disclosure in one jurisdiction with reference to what are the exact facts in relevant litigation in a corresponding case in the other", enjoined upon "parties and counsel", by Taft C. J. in Harkin v. Brundage, 276 U. S. 36, 55. In view of his solemn admission of September 9, 1930 in the State court (as to the vesting first of the State court's jurisdiction) after he had on July 18, 1930 secured a dissolution of the attachments—the process by which it had vested on November 7, 1923, prior to the adjudication in

bankruptcy on November 9, 1923—respondent and his present counsel might well be accused of disingenuousness.

The use in piecemeal procedure of final orders of the U. S. Bankruptcy Court (so irregular and illegal, as shown above), which were secured by him in 1928, long after the debtor-bankrupt had contracted in the escrow agreement of October 18, 1923 (induced by his representation that no bankruptcy proceeding was contemplated by him)—to determine the validity of his objections to these judgments, entered in the State court on September 14, 1923, upon debtor's promissory notes (in Pennsylvania termed "judgment" notes) under his seal, with a "rider" or power of attorney in them, authorizing the holder to "confess" judgments thereon, in accordance with Pennsylvania law and procedure—and thus undo all that had been done to that end in the State court up to March 14, 1927, certainly was wholly lacking in candor and intellectual honesty.

It is to be noted that neither debtor nor his trustee (respondent) ever, at any time, questioned the authenticity, execution or delivery of the notes. The State court's jurisdiction *first* became fully vested over the *res* and the parties on November 7, 1923 and its complete jurisdiction was finally adjudicated by it (to be the proper forum in which to test the validity of the judgments) on January 28, 1927, *on respondent's own petitions* to that court. Respondent thus made the questions of the forum and proper procedure to that end *res judicata first* in the State Court on January 28, 1927 as against the orders of the U. S. Bankruptcy Court, of January 31, 1928, which respondent now urges as the *res judicata*, to control the final disposition of this whole litigation, so unduly protracted by respondent's misuse and abuse of the Bankruptcy Court's process. Of this

charge he must stand convicted, by his amazing solemn admission on September 9, 1930, that the State court's jurisdiction had become fully vested on November 7, 1923 when the service of its process drew into its possession the fund in escrow and likewise summoned the parties interested.

The fallacy and fundamental error in respondent's argument, are his complete disregard of the basic principle of priority in the rule of comity in the American system of dual courts of concurrent jurisdiction. Comity requires that the court's jurisdiction, which vests first, shall be respected to the end of the litigation. By respondent's acts the two courts (State and federal bankruptcy court) have been imposed upon and led into regrettable "competition and rivalry" in regard to assuming jurisdiction. (Harkin v. Brundage, supra.)

Further reply would seem unnecessary. Petitioner would respectfully refer to the "argument" in petitioner's brief, in support of his contention that on the facts and applicable law, he is entitled to a review of this case by this court, to the end that justice may be done to his rights and property claims, in "accord with the teachings of right, reason and conscience".

WHEREFORE, petitioner respectfully submits and earnestly urges that his prayer should be granted and a writ of certiorari allowed, directed to the United States Court of Appeals for the Third Circuit, to return to this court for review by your Honorable Court, the record of the proceedings in the Bankruptcy Cause No. 8578, in the District Court of the United States for the Eastern District of Pennsylvania.

EDWIN C. EMHARDT,
Counsel for Petitioner.